

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THERESA HOLBROOK KRAFT, et al.,

Plaintiffs,

No. CIV S-04-0129 GGH

vs.

SHANNON LANEY, et al.,

Defendants.

ORDER

Previously pending on this court's calendar for July 21, 2005 was plaintiffs' motion for partial summary judgment against Barton Healthcare System ("Barton"), defendant County of El Dorado ("El Dorado") and Sergeant Don Atkinson's motion for summary judgment and/or partial summary judgment, and Barton Healthcare System's motion for summary judgment or summary adjudication.¹ Amitai Schwartz appeared on behalf of plaintiffs. Thomas Perry and Allison Lafferty appeared for Barton. Franklin Gumpert appeared for the County of El

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¹ On the day prior to the hearing, plaintiffs' counsel communicated to chambers that the parties had come to an agreement regarding their motion to exclude at trial testimony of South Lake Tahoe ("SLT") defendants' expert Don Cameron, and it would be withdrawn.

1 Dorado and Sergeant Atkinson. Richard Creeggan represented the South Lake Tahoe
2 defendants.²

3 I. BACKGROUND

4 This case is proceeding on the first amended complaint, filed August 20, 2004.
5 Plaintiffs are Paul Kraft's widow and children who claim that after Kraft crashed his car into a
6 snowbank on April 4, 2003, police arrested him for driving and being under the influence of a
7 controlled substance. They transported him to Barton Hospital for a blood test where he stopped
8 breathing and underwent cardiac arrest. He died the next day. Plaintiffs claim that actions by
9 South Lake Tahoe Police and an El Dorado County deputy sheriff (sergeant) in arresting Kraft
10 and applying excessive force, as well as lack of medical attention by police and Barton, caused
11 his death. Plaintiffs claim that defendants should have medically screened him to determine he
12 had serious medical needs. Present defendants are County of El Dorado, Sergeant Don Atkinson,
13 Officers Deanna Lewis, Shannon Laney, Mark Gentle, Schyler Beaty, the City of South Lake
14 Tahoe, and Barton Healthcare System.

15 The first amended complaint contains claims for violation of plaintiffs' civil rights
16 under 42 U.S.C. § 1983, including substantive due process rights, Fourth Amendment for
17 excessive force³ and deliberate indifference to medical needs, right to familial association,
18 unlawful custom, practice and policy by South Lake Tahoe which caused Kraft's death, violation
19 of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), and state law claims
20 of negligence, failure to summon medical care, and violation of Cal. Health and Safety Code §
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22 ² The SLT defendants filed non-oppositions to the motions of Barton and El Dorado, and
23 made no argument at hearing.

24 ³ The first amended complaint uses the term "unreasonable seizure," but the court
25 understands plaintiffs to mean "excessive force" insofar as plaintiffs are alleging the facts and
26 conceivable interpretation of the facts was plaintiff "unreasonably seized" when first arrested by
the South Lake Tahoe officers as that term is known in Fourth Amendment jurisprudence. See,
United States v. Williams, – F.3d –, 2005 WL 1950006 (9th Cir. 2005).

1317 et seq. Plaintiffs seek compensatory and punitive damages.

II. SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment avoids unnecessary trials in cases with no disputed material facts. See Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986). Two steps are necessary. First, according to the substantive law, the court must determine what facts are material. Second, in light of the appropriate standard of proof, the court must determine whether material factual disputes require resolution at trial. See id. at 248, 106 S. Ct. 2510.

When the opposing party has the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. See e.g., Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885, 110 S. Ct. 3177, 3187 (1990). When the opposing party has the burden of proof, the moving party need only point to matters which demonstrate the absence of a genuine material factual issue. See Celotex v. Cattret, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

If the moving party meets its burden, the burden shifts to the opposing party to establish genuine material factual issues. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986).⁴ The opposing party must demonstrate that disputed facts are material, *i.e.*, facts that might affect the outcome of the suit under the governing law, see Anderson, 477 U.S. at 248, 106 S. Ct. at 2510; T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that disputes are genuine, *i.e.*, the

⁴ The nonmoving party with the burden of proof "must establish each element of his claim with significant probative evidence tending to support the complaint." Barnett v. Centoni, 31 F.3d 813, 815 (9th Cir. 1994) (internal quotations omitted). A complete failure of proof on an essential element of the nonmoving party's case renders all other facts immaterial, and entitles the moving party to summary judgment. Celotex, 477 U.S. at 322, 106 S. Ct. at 2552.

parties' differing versions of the truth require resolution at trial, see T.W. Elec., 809 F.2d at 631. The opposing party may not rest upon the pleadings' mere allegations or denials, but must present *evidence* of specific disputed facts. See Anderson, 477 U.S. at 248, 106 S. Ct. 2510.⁵ Conclusory statements cannot defeat a properly supported summary judgment motion. See Scott v. Rosenberg, 702 F.2d 1263, 1271-72 (9th Cir. 1983).

The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. See Anderson at 249, 255, 106 S. Ct. at 2510-11, 1513. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. American Int'l Group, Inc. v. American Int'l Bank, 926 F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing Celotex, 477 U.S. at 322, 106 S. Ct. at 2552).

If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. See Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). On the other hand, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587, 106 S. Ct. 1356 (citation omitted). In that case, the court should grant summary judgment.

III. DEFENDANTS ATKINSON'S AND EL DORADO COUNTY'S OBJECTIONS TO PLAINTIFFS' EVIDENCE

The El Dorado County defendants object to specific evidence proffered by plaintiffs, including portions of the Rule 26 statements attached to the declarations of Paul Hermann, M.D. and Benjamin Lerman, M.D., and portions of the depositions of Lisa Hudson and Shannon Laney.

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⁵ A verified complaint may be used as an affidavit in opposition to the motion. Schroeder v McDonald, 55 F. 3d 454, 460 (9th Cir. 1995); McElyea v. Babbitt, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curiam).

1 A. Hermann and Lerman Statements

2 These statements are not relevant in determining Atkinson's motion for summary
3 judgment because they relate to Kraft's medical condition and care involved, and the court has
4 determined that Atkinson's involvement was minimal. See discussion *infra*.

5 B. Hudson Deposition

6 The objections are to Hudson's testimony that the officers applied force to hold
7 Kraft down and the degree of force applied which Hudson described as "extreme." (Hudson
8 Depo. at 24-25.)

9 This testimony is not relevant to the basis for determining Atkinson's motion for
10 summary judgment due to Atkinson's non-involvement at the time. See discussion *infra*.

11 In any event, on reading the Hudson testimony at the cited pages, the word
12 "extreme" does not mean "excessive," but rather, that much force in the physics sense was used
13 "because he was extremely combative." All this testimony does is prove one of Newton's laws of
14 physics: for every action there is an equal and opposite reaction. "Extreme" pushing force was
15 used in order to hold down a person exhibiting "extreme" combativeness. Nothing in Hudson's
16 deposition fairly indicates that the force used was greater than that necessary to control the
17 situation, or that the force was painful or injurious in any respect.

18 C. Laney Deposition

19 Defendants object to the following portions of Laney's deposition.

20 A. There was some discussion before I opened the door of how we
21 were going to get him and how we were going to handle the call, or
22 how we were going to handle the situation. So I didn't just jump
23 into it. We discussed it and then I opened the door.

24 (Laney Depo. at 77:2-5.)

25 Q. Okay. So who was in that first huddle?

26 A. Sergeant Atkinson was there and Deputy Wright was there.

1 Reserve Officer Gentle, Officer Lewis and Officer Beaty were all
2 there by the door talking about it.

3 (Id. at 77:19-23.)

4 Q. You were sort of working as a team at that point?

5 A. Yes.

6 (Id. at 78:6-8.)

7 Q. So in that five to ten minutes, you were sort of figuring out the
8 plan of how to deal with this; correct?

9 A. In that time we were waiting for the other officers to arrive, and,
10 yes, we were kind of formulating a plan on how to deal with the
11 situation.

12 (Id. at 79:21- 80:1.)

13 Defendants object to the underlined terms as conclusory, speculative, and lacking
14 foundation. This testimony is pertinent to Atkinson's involvement and motion. Nevertheless, the
15 terms used, when taken in context with the remainder of the deposition are not objectionable.
16 Defendants' objections in this regard are overruled.

17 IV. DEFENDANT BARTON'S OBJECTIONS TO PLAINTIFFS' EVIDENCE

18 A. Hermann and Lerman Statements

19 Barton objects to the statements attached to these experts' declarations as
20 inadmissible because they constitute unsworn expert opinion, and contain hearsay and irrelevant
21 conclusions. These statements are not relevant to the parties' motions regarding whether Barton
22 was a state actor, and whether EMTALA and its state law equivalent apply. These expert
23 statements are relevant to plaintiffs' 42 U.S.C. § 1983 claim, and are adequate as submitted for
24 summary judgment. Defendant's objections are overruled.

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1 B. Barton's Objections to Plaintiffs' Responses to Its Statement of Undisputed Facts

2 Barton has set forth a series of its undisputed facts which it claims plaintiffs
3 improperly dispute with supporting evidence which Barton claims misconstrues the undisputed
4 facts and at times are blatant misstatements. The objections attempt to demonstrate how
5 plaintiffs' supporting evidence does not really dispute the fact it purports to dispute. The court
6 has reviewed Barton's objections, plaintiffs' disputes and the record in deciding the motions. It
7 will not make a separate ruling on each objection.

8 V. DEFENDANTS EL DORADO COUNTY AND ATKINSON'S MOTION FOR SUMMARY
9 JUDGMENT

10 The South Lake Tahoe Defendants and Barton Healthcare System have filed non-
11 oppositions to this motion.

12 Plaintiffs' allegations against Atkinson and the County of El Dorado are cast in
13 three main areas: (1) the force used to transport plaintiffs' decedent into the hospital; (2) the force
14 used to restrain Kraft in the hospital; and (3) the alleged inaction on the part of Atkinson to ensure
15 that a medical screening was done "first" as opposed to a blood draw. The first two areas are
16 governed by the Fourth Amendment, the last is governed by the Fourteenth Amendment
17 (substantive due process).

18 A. Facts Regarding Atkinson's Involvement in the Incident⁶

19 The undisputed facts concerning Kraft's behavior are as follows. After Kraft drove
20 his vehicle into the snowbank, bystanders who had personal experience with drugs approached,
21 and thought that Kraft had taken a hallucinogen. They observed him to be nervously moving his
22 hands, and talking about dogs coming after him. When Officer Lewis arrived, she thought that
23 Kraft was hallucinating about dogs coming after him. He complied with her pat down search.
24 During the time that Lewis transported Kraft to Barton Hospital, he became verbally abusive, and
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26 ⁶ The facts set forth here are undisputed except where specifically summarized as
disputed.

1 was kicking out in the police car. By the time the patrol car arrived at the hospital, it was rocking
2 to and fro as a result of Kraft's kicking, frightening the nurse who came to greet the car. Kraft
3 continued to yell, scream and kick the window while in the vehicle which was parked in the
4 carport outside the emergency room. During the time that Atkinson went to one side of the car
5 and opened the door, Kraft continued to yell and kicked his feet out near Atkinson's stomach.
6 After Kraft's legs were cuffed, he continued to kick them at medical personnel. While being
7 wheeled into the hospital on the gurney, Kraft continued screaming and kicking. It is disputed
8 whether he was also spitting. He appeared angry and wanting to get away. Kraft continued to
9 thrash about after being deposited in lab room 5. After Atkinson left this room, Officer Beaty sat
10 on Kraft's legs because they were still going wild. According to medical staff Jamie Dillon, Kraft
11 was one of the most physically resistive persons ever to come in for a blood draw.

12 Atkinson was not involved in Kraft's arrest, but became involved as a result of a
13 radio call without a request for assistance, but to which he responded "in case they needed
14 additional help." At Barton Hospital Atkinson began his involvement when he helped to get Kraft
15 out of the police vehicle by holding down his feet so he couldn't kick. There was a huddle of
16 officers in which he took part to determine how to get Kraft out of the vehicle. It is disputed
17 whether Atkinson had any input or decisionmaking influence. Lewis stated that it was her
18 decision to keep shackles and handcuffs on Kraft and that she was not influenced by any
19 suggestion or recommendation Atkinson may have made. Lewis Depo. at 342:5-13. Atkinson
20 also helped place leg cuffs on Kraft's feet after being directed to move to the other side of the
21 vehicle for this purpose by Officer Laney. Other officers held Kraft's upper body and pulled him
22 out of the vehicle onto a gurney. The decision was made to transport Kraft in this way pursuant to
23 a consensus among the officers present, although Laney stated that she took the lead because Kraft
24 was the SLTPD's arrestee and El Dorado County Sheriff's Department was only there to assist.
25 Laney Depo., Exh. FF at 78. After placing the leg cuffs on Kraft's feet, Atkinson did not touch
26 Kraft until he was in room 5 of the hospital.

1 B. Fourth Amendment - Excessive Force (Unreasonable Seizure)

2 At the outset, it should be noted that although ¶ 48c of the first amended complaint
 3 alleges violations of the due process clause of the Fourteenth Amendment, “[w]here a particular
 4 amendment ‘provides an explicit textual source of constitutional protection’ against a particular
 5 sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive
 6 due process,’ must be the guide for analyzing these claims.” Albright v. Oliver, 510 U.S. 266,
 7 273, 114 S. Ct. 807, 813, (1994) (plurality opinion) (quoting Graham v. Connor, 490 U.S. 386,
 8 395, 109 S. Ct. 1865, 1871, (1989)). Accordingly, the court has not considered plaintiffs’ bare
 9 substantive Fourteenth Amendment claim, in light of the Fourth Amendment’s specific protection
 10 against unreasonable searches and seizures, and the lack of factual allegations in the complaint to
 11 support other theories of constitutional protection.

12 Under the Supreme Court’s ruling in Graham v. Connor, 490 U.S. 386, 397, 109 S.
 13 Ct. 1865, 1972, 104 L.Ed.2d 443 (1989), the appropriate frame of reference for the determination
 14 of excessive force arrest cases is the Fourth Amendment “reasonableness” standard, that is,
 15 “whether the officers’ action are ‘objectively reasonable’ in light of the facts and circumstances
 16 confronting them, without regard to their underlying intent or motivation.” Evidence of evil intent
 17 or sadistic motive has “no proper place in [the] inquiry.” Id. at 1873.

18 In Saman v. Robbins, 173 F.3d 1150, 1156 (9th Cir. 1999), the court found that
 19 based on the undisputed evidence that the officer delivered a single kick to subdue the arrestee
 20 under tense circumstances where an officer had been shot during a gun battle, the evidence was
 21 insufficient as a matter of law to support a jury’s verdict of liability under § 1983 or state battery.
 22 See also Mendoza v. Block, 27 F.3d 1357, 1362-63 (9th Cir. 1994) (officer’s use of police dog
 23 who inflicted several bites and held onto suspect was objectively reasonable where robbery
 24 suspect was thought to be armed); Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994)
 25 (pain compliance techniques causing bruises, pinched nerve and broken wrist on abortion
 26 protesters who were not resisting were objectively reasonable); Saucier v. Katz, 533 U.S. 194,

209, 121 S. Ct. 2151, 2160 (2001) (force used to half-walk, half-drag protester from scene of Vice-President's speech and shove or throw him into military van was not excessive). Atkinson's actions, when viewed in the light most favorable to plaintiffs, although admittedly not involving the same degree of exigent circumstances present in Mendoza and Forrester, do not come close to the force described by the Ninth Circuit as objectively unreasonable given the circumstances here of a wildly acting-out arrestee.

This is not to say that a police officer can escape liability simply because "he sits back and does nothing" to further the excessive force. Inactivity in the face of circumstances in which the reasonable police officer would know that he needed to take steps to avoid the use, or continued use, of excessive force on a detainee will lead to liability. Lolli v. County of Orange, 351 F.3d 410, 418 (9th Cir. 2003). Nor does one have to be a supervisor in order to obtain this type of "inactivity" liability. See Fundiller v. Cooper City, 777 F.2d 1436, 1441-1442 (11th Cir.1985) ("It is not necessary that a police officer actually participate in the use of excessive force in order to be held liable under section 1983. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force ... can be held liable for his nonfeasance."); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir.1983) (concluding that an officer has "a duty to prevent the use of ... force, even if the officers beating [the victim] were [the officer's] superiors"); Ware v. Reed, 709 F.2d 345, 353 (5th Cir.1983) (concluding that an "instruction on the defendant's alleged acquiescence in the unconstitutional conduct of other officers should have been given"); Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir.1982) (concluding "that it is not necessary, in order to hold a police officer liable under § 1983, to demonstrate that the officer actively participated in striking a plaintiff"); Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir.1972) (stating that "one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge" and that this responsibility exists "as to nonsupervisory officers who are present at the scene of

1 such summary punishment”).

2 But the facts and circumstances of Kraft’s transport into the medical facility do not
3 give rise to any liability, passive or active. Plaintiffs strenuously argue that Kraft required urgent
4 medical treatment, or at least screening; the South Lake Tahoe officers wanted to have a blood
5 draw. Under either intention, Kraft, who was at best an unruly, combative detainee, was not going
6 into the facility in the absence of force. And, police officers have to exert enough force so that the
7 wildly thrashing person understands who is in control of the situation. Common sense informs us
8 that inadequate exhibitions of control by police officers can lead to situations where the detainee
9 begins to understand (erroneously) that he is in control thereby escalating his misconduct to the
10 point where more deleterious forms of force have to be used. There simply is no fact presented
11 which suggests that the rather mild force, causing no apparent physical injury whatsoever, used to
12 transport the drug intoxicated Kraft into the medical facility was excessive.

13 The same result obtains for Atkinson’s minimal involvement in restraining Kraft
14 while he was in Room 5 (the blood drawing room). The undisputed facts show that Kraft was still
15 straining and thrashing wildly while in the room. Kraft was characterized by the medical
16 personnel as the most physically resistive person who had ever come in for a blood draw. At all
17 times, Kraft was in the actual custody of the South Lake Tahoe officers. While a South Lake
18 Tahoe officer tried to calm him down through talking, such had no effect. Atkinson initially
19 entered Room 5 to assist in holding Kraft’s legs down. But he left after approximately two
20 minutes. The phlebotomist required a “non-moving target” in order to draw blood, and further
21 restraint was necessary. A South Lake Tahoe officer therefore sat on Kraft’s thrashing legs
22 holding his thighs in a stationary position. Some type of cover for the purpose of “blindfolding”
23 Kraft was utilized by a South Lake Tahoe officer after Atkinson had left the room. Atkinson
24 never suggested that a spit shield or cover be placed on Kraft while he was either inside or outside
25 of the room. At some point Kraft was on his stomach; no evidence suggests that Atkinson, from
26 his partially blocked vantage point outside the room understood that Kraft was experiencing

1 breathing difficulties until the persons in Room 5 noticed and caused a Code Blue to be called.

2 Before the Code Blue was called, Atkinson had been outside Room 5 for one to five minutes.

3 Given these circumstances, no reasonable officer would have believed that his
4 holding of the legs for a few minutes constituted excessive force. No reasonable officer, from
5 partially observing the activities in Room 5 from outside the room, would have believed that the
6 restraint activities were excessive to the point where the outside intermittent observer would have
7 concluded that intervention had to take place. This is so especially because medical personnel
8 were in the room, and one could reasonably have expected these medical personnel to object to
9 any restraint measures excessive to the need to keep Kraft still, or to be cognizant of any actions
10 which would cause health concerns.

11 C. Deliberate Indifference to Serious Medical Needs

12 Atkinson argues that as a matter of law he did not display deliberate indifference
13 because other witnesses and even medically trained personnel did not think Kraft showed any
14 signs of injury or behavior which would lead one to think he needed medical care.

15 Plaintiffs argue that the hospital would not examine Kraft or perform a “fit for”
16 exam unless an officer requested it, and none did so. Plaintiffs suggest that Atkinson should have
17 requested the exam.

18 Claims by arrestees are analyzed under the Fourteenth Amendment Due Process
19 Clause, rather than under the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S.
20 Ct. 1861 (1979). Lolli v. County of Orange, 351 F.3d at 418-19. Because pretrial detainees’
21 rights under the Fourteenth Amendment are comparable to prisoners’ rights under the Eighth
22 Amendment, the same standards are applied. Redman v. County of San Diego, 942 F.2d 1435,
23 1441 (9th Cir. 1991). In order to state a § 1983 claim for violation of the Eighth Amendment
24 based on inadequate medical care, plaintiff must allege “acts or omissions sufficiently harmful to
25 evidence deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106,
26 97 S. Ct. 285, 292 (1976). To prevail, plaintiff must show both that his medical needs were

objectively serious, and that defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299, 111 S. Ct. 2321, 2324 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 998 (1992).

In order to defeat summary judgment, under traditional Eighth Amendment standards used in Fourteenth Amendment claims such as this one, Lolli must show that he was (1) “confined under conditions posing a risk of ‘objectively, sufficiently serious’ harm” and (2) “that the officials had a ‘sufficiently culpable state of mind’ in denying the proper medical care.” Clement v. Gomez, 298 F.3d 898, 904 (9th Cir.2002). [FN6] “A defendant is liable for denying needed medical care only if he ‘knows of and disregards an excessive risk to inmate health and safety.’” Gibson, 290 F.3d at 1187. “In order to know of the risk, it is not enough that the person merely ‘be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, [] he must also draw that inference.’ ... But if a person is aware of a substantial risk of serious harm, a person may be liable for neglecting a prisoner’s serious medical needs on the basis of either his action or his inaction.” *Id.* at 1188 (alteration in original). “Prison officials are deliberately indifferent to a prisoner’s serious medical needs when they deny, delay, or intentionally interfere with medical treatment.” Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir.2002) (internal quotation marks omitted).

Lolli v. County of Orange, 351 F.3d 410, at 418-419.

Also significant to the analysis is the well established principle that mere differences of opinion concerning the appropriate treatment cannot be the basis of an Eighth Amendment violation. Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

When Atkinson first heard the radio call by Officer Lewis which stated she was taking an arrestee in, he heard Lewis state that she was “en route to Barton Hospital for either a fit-for or blood draw, one of the two. I don’t recall which one.” (Atkinson Depo. at 39:5-8.) The decision of how to proceed with Kraft was already made before Atkinson arrived on the scene. He was not part of the decision to obtain a blood draw rather than a fit-for. He also testified that when he arrived at the hospital, he assumed Kraft was there to get a blood draw for drunk driving.

1 He made no assumption regarding whether he was also there for a “fit-for.” (Id. at 49:16-24.)
2 Once Atkinson placed the shackles on Kraft’s legs, he backed off so the other officers could take
3 Kraft out of the car. (Id. at 54.) Atkinson assumed Officer Lewis was in charge because it was
4 standard practice for the officer who makes the call to be in charge of that call. (Id.) This practice
5 would be maintained even if a responding officer like Atkinson held a higher position such as
6 sergeant. (Id.) As Kraft was being wheeled into the hospital, Atkinson walked in behind the other
7 officers and behind the gurney, and could not hear what the other officers were talking about. (Id.
8 at 62.) After Kraft was placed in room 5, it is undisputed that Atkinson held his feet down for
9 approximately two minutes, and then left the room without re-entering. (UF #23.) After leaving
10 the room, Atkinson spoke with another officer and had only a partial view of the room. It is
11 undisputed that Atkinson never saw Kraft having a difficult time breathing, hyperventilating or
12 gasping for air. (UF #44.)

13 Lolli, supra presents an interesting counterpoint to the situation here. Lolli was a
14 diabetic who alleged excessive force and an ignoring of his medical needs as a diabetic. Finding
15 that diabetes and possible insulin shock constituted a serious medical need, the issue before the
16 Ninth Circuit was whether the officers maintaining custody over Lolli had reason to know Lolli
17 was a diabetic *and* should have inferred from the circumstances before them that if Lolli did not
18 receive food, very untoward health events would occur. Because Lolli directly told the officers of
19 his medical condition, his needs and deteriorating condition, the Ninth Circuit found issues of fact
20 both on the merits of the constitutional claim and for qualified immunity purposes as well.

21 The situation here is a far cry from Lolli. While it may be true, as plaintiffs argue,
22 that drug or alcohol intoxication itself can lead to other serious medical conditions, the frequency
23 of such is by no means as well established for laypersons, or medical science, such that it can be
24 equated to the rather commonly well known hazard presented by a diabetic in dire need of food.
25 But most of all, Atkinson is in no way in the same position as the officers in Lolli. Atkinson was
26 a peripheral officer—the officers with charge of Kraft’s custody were the South Lake Tahoe

officers. Most importantly, Kraft was in a *medical facility* where Atkinson would have the expectation that medical personnel, working closely with the South Lake Tahoe officers, would have the expertise to recognize a dangerous medical condition well ahead of the out-of-the-room Atkinson. It is not lost on the court that plaintiffs' case herein against the hospital derives in part from the allegation that medical personnel should have advised against, or even overridden, any taking of blood unless it was for a medical screening or treatment. To find that a peripherally involved deputy sheriff, with little knowledge of the facts that led up to Kraft's presence in the hospital, and with knowledge that medical personnel were working upon Kraft, and with no knowledge of any outward signs of medical distress (aside from the fact of intoxication itself), should have nonetheless somehow stopped all activity in the room and demanded a medical screening or treatment (which may well have required a blood draw), would fly in the face of any reasonable expectation. The court will not place such unreasonable expectations on law enforcement officers.

D. Deliberate Indifference to Plaintiffs' Rights to Familial Association

The first amended complaint alleges that "[b]y committing the violations set forth in paragraph 48 [claims under 42 U.S.C. § 1983], defendants ... deprived plaintiffs ... of their right to continued association with Paul Kraft and deprived them of their constitutional right to a continued familial relationship with Paul Kraft." (Am. Compl. ¶ 49.)

Because the court finds no excessive force or deliberate indifference on the part of Atkinson toward Paul Kraft, as a corollary it also finds no violation of plaintiffs' rights to familial association as a matter of law. Venerable v. City of Sacramento, 185 F. Supp. 2d 1128, 1131 (E.D. Cal. 2002).

E. Liability as for the Wrongs of Others

Atkinson argues that the "team liability" concept is not acceptable under 42 U.S.C. § 1983. Plaintiffs argue that he acted as a team with the SLTPD in his position as a sergeant who was involved in the original huddle outside the hospital, and he is therefore subject to liability as

1 having been a member of the team.

2 A plaintiff can not subject an officer to liability merely due to his membership in a
3 group unless there is a showing of individual participation in the unlawful conduct. Jones v.
4 Williams, 297 F.3d 930, 935 (9th Cir. 2002). Here, although Atkinson did participate minimally
5 in the incident at issue, his actions did not constitute participation in *unlawful* conduct as a matter
6 of law. As discussed in the preceding sections, his actions did not constitute excessive force or
7 deliberate indifference.

8 F. Qualified Immunity

9 Atkinson argues that this concept applies to his holding down of Kraft's leg while
10 he was on a gurney to protect others because it was not clearly established that an officer could
11 not do so. In regard to the pillow case and the actions of the other officers in subduing Kraft,
12 Atkinson argues that because the force was not lethal, a reasonable officer could have believed
13 these actions were lawful and thus subject to qualified immunity.

14 Qualified immunity protects government officials from suits seeking civil
15 damages. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of
16 litigation.'" Saucier v. Katz, 533 U.S. 194, 200, 121 S. Ct. 2151, 2156 (quoting Mitchell
17 v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985)). It provides "'an immunity from suit
18 rather than a mere defense to liability . . .'" Id. (quoting Mitchell, at 526, 105 S. Ct. at 2815)
19 (emphasis in original).

20 Two questions determine whether a government official is entitled to qualified
21 immunity. First, the court must determine whether "'[t]aken in the light most favorable to the
22 party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional
23 right.'" Clement v. Gomez, 298 F.3d 898, 903 (9th Cir. 2002), quoting Saucier, 533 U.S. 194,
24 201, 121 S. Ct. 2151, 2156 (2001). If the answer is "no," the inquiry ends. Saucier, 533 U.S. at
25 201, 121 S. Ct. at 2156. If the answer is "yes," the court must next determine "whether the right
26 was clearly established." Id. Unless the law "put the [official] on notice that [his or her] conduct

would be clearly unlawful,” the official is entitled to qualified immunity. Saucier, 533 U.S. at 202, 121 S. Ct. at 2156-57. If a reasonable official could have believed his or her conduct was lawful, immunity protects the official. The concern of the second prong of the immunity inquiry “is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . .” Id. at 195, 121 S. Ct. at 2153. “This standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.” Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir. 2001) (quotations and citations omitted).

Moreover, while public officials asserting qualified immunity have the burden of pleading the defense, plaintiff bears the burden of demonstrating the conduct at issue violated a right that was clearly established when the conduct occurred. Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002).

This court has just found that construing the facts in the light most favorable to plaintiffs, Atkinson is entitled to judgment as a matter of law on all federal claims. Therefore, under the first prong of this analysis, Atkinson did not violate a constitutional right. The qualified immunity analysis ends at this point.

G. Negligence⁷

Plaintiff’s Fourth Cause of Action alleges negligence against Atkinson, and hence El Dorado County, on account of negligence. As discussed previously, the areas of concern are Atkinson’s use of force to assist the South Lake Tahoe officers in carrying Kraft into the medical facility and the actions taken inside the medical facility with respect to the blood draw and alleged lack of screening/treatment.

Whether an action alleging injury by a police officer sounds in negligence or intentional tort, the breach element requires proof that the officer used unreasonable or excessive force. Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1272, 74 Cal. Rptr. 2d 614 (1998). For

⁷ Defendants’ request to decline to exercise jurisdiction over the state law claims is denied because those claims can be disposed of in this order.

1 the reasons previously set forth at length, no material facts exist which would preclude summary
2 judgment on this basis.

3 It is true, as plaintiffs assert that liability could attach on a negligence basis if
4 Atkinson committed acts which increased the risk of harm to Kraft, Benavidez v. San Jose Police
5 Dept., 71 Cal. App. 4th 853, 865, 84 Cal. Rptr. 2d 157, 165 (1999). Based on the facts outlined in
6 the preceding sections, there is no evidence that the affirmative acts of Atkinson increased the risk
7 of harm to Kraft.

8 Plaintiffs also have a claim of county liability premised on the negligence of
9 Atkinson. Because Atkinson was not negligent as a matter of law, the county is not liable.

10 Insofar as plaintiffs assert that Atkinson and the County of El Dorado were
11 negligent in terms of not having the blood draw terminated with then ensuing medical
12 screening/treatment, this claim will be discussed in connection with plaintiffs' Fifth Cause of
13 Action which involves the alleged failure to summon medical care.

14 H. Duty to Summon Medical Care

15 Atkinson argues he did not breach a duty to summon medical care for Kraft
16 because Kraft was not in his custody but in the custody of Officer Lewis or SLTPD, and medical
17 personnel present did not think Kraft needed medical care. Plaintiffs dispute that Kraft was not in
18 Atkinson's custody.

19 Plaintiffs' dispute is simply an erroneous conclusion drawn from the undisputed
20 facts that Atkinson was present, and assisted another department's officers, *after the arrest had*
21 *long been made*, when on reaching the medical facility premises, Kraft exhibited such conduct
22 that assistance was necessary. The undersigned cannot conceive of how this places Kraft in
23 Atkinson's "custody." However, even if the court is wrong in this conclusion, i.e., every police
24 officer on the scene, no matter what that officer's input into a persons' arrest, and no matter how
25 long the person has been in the custody of another department's officers, makes that late-to-the-
26 event officer a custodian of the person arrested, plaintiffs theory is still strained and non-

actionable against Atkinson and the County of El Dorado.

The pertinent code section, Cal. Govt. Code § 845.6, states in part:

Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.

Even if Atkinson had a duty under § 845.6, the duty is limited to summoning immediate medical care. It does not encompass a duty to provide reasonable or appropriate care. Watson v. State of California, 21 Cal. App. 4th 836, 841-842, 26 Cal. Rptr. 2d 262, 265 (1993). Here, Kraft was in a room in the Emergency Department of the hospital, surrounded by medical staff. Any duty Atkinson may have had to summon medical care was satisfied. Furthermore, “the public employee must know or have reason to know of the need of immediate medical care and fail to summon such care.” Lucas v. County of Los Angeles, 47 Cal. App. 4th 277, 288, 54 Cal. Rptr. 2d 655, 663 (1996), citing Watson, 21 Cal. App. 4th at 841-842, 26 Cal. Rptr. 2d at 265. Here, Atkinson was not in the room when Kraft began to exhibit the need for immediate medical care and cannot be faulted for any failure to obtain it. Finally, police officers “do not have the medical training to know whether a prisoner’s medical condition has been properly diagnosed and treated.” Watson, 21 Cal. App. 4th at 843, 26 Cal. Rptr. 2d at 266.

I. Interference with Rights Under Cal. Civ. Code 52.1

Cal. Civ. Code § 52.1 provides for a civil action where a person’s federal or state constitutional rights have been violated. Because the court has found no constitutional violations by Kraft, summary judgment is granted on this claim. See Reynolds v. County of San Diego, 84 F.3d 1162, 1170-71 (9th Cir. 1996), overruled on other grounds, Acri v. Varian Associates, Inc., 114 F.3d 999 (9th Cir. 1997).

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1 VI. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

2 This motion concerns plaintiffs' contention that as a matter of law, Barton acted
3 under color of state law when Kraft was brought to Barton Hospital, and therefore 42 U.S.C. §
4 1983 applies.⁸ Plaintiffs support this assertion by virtue of a California statute, an agreement
5 between the hospital and SLT Police Department, and the actions of the parties.

6 As explained in recent cases, "[w]hat is fairly attributable [to state action] is a
7 matter of normative judgment, and the criteria lack rigid simplicity." Brentwood Academy v.
8 Tennessee Secondary School Ath. Assoc., 531 U.S. 288, 295, 121 S. Ct. 924, 930 (2001). As
9 discussed recently by the Ninth Circuit:

10 Conduct that is actionable under the Fourteenth Amendment as
11 State action is also action under color of State law supporting a suit
12 under § 1983. Lugar v. Edmondson Oil Co., 457 U.S. 922, 935,
13 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). "[S]tate action may be
14 found if, though only if, there is such a 'close nexus between the
15 State and the challenged action' that seemingly private behavior
16 'may be fairly treated as that of the State itself.'" Brentwood Acad.
17 v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295,
18 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (quoting Jackson v.
19 Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 42
20 L.Ed.2d 477 (1974)).

21 "[No] one fact can function as a necessary condition across the
22 board ... nor is any set of circumstances absolutely sufficient, for
23 there may be some countervailing reason...." Brentwood, 531 U.S.
24 at 295-96, 121 S.Ct. 924. Because of the fact-intensive nature of
25 the inquiry, courts have developed a variety of approaches to the
26 State actor issue. See id. at 296, 121 S.Ct. 924 (listing seven
approaches to the issue including the coercion test, the joint action
test, the public function test, and the entwinement test).

21 Lee v. Katz, 276 F.3d 550, 554 (9th Cir. 2002).

22 The most commonly utilized tests have been described in Cornish v. Correctional
23 Services, 402 F.3d 545, 549-50 (5th Cir. 2005):

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25 ⁸ This issue is also raised by Barton in its motion for summary judgment. Both briefings
26 on this issue will be resolved in this section.

The 'public function test' examines whether the private entity performs a function which is 'exclusively reserved to the State.' Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 158, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Under the 'state compulsion test,' a private actor's conduct is attributable to the State when it exerts coercive power over the private entity or provides significant encouragement. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 170-71, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The 'nexus' or 'state action test' considers whether the State has inserted 'itself into a position of interdependence with the [private actor, such] that it was a joint participant in the enterprise. Jackson v. Metro. Edison Co., 419 U.S. 345, 357-58, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). And, under the 'joint action test,' private actors will be considered state actors where they are 'willful participant[s] in joint action with the State or its agents.' Dennis v. Sparks, 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

Barton concedes it was a state actor for purposes of the blood draw only. (Barton's MSJ at 16:18.) The issue is whether Barton's actions in regard to its role in drawing blood were so intertwined with its duties to screen or treat that it was a state actor for all purposes. Turning to the factors applicable to a finding that Barton is a state actor in regard to a claim of failure to screen or treat Kraft, it is undisputed that this hospital has been delegated governmental functions. See West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250 (1988) (delegation of government mandated medical treatment) and Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627-628, 111 S. Ct. 2077 (1991) (use of peremptory challenges in a civil action). California statutes set forth an extensive regulatory scheme governing blood draws by the state. See Cal. Veh. Code § 23612. For example, pursuant to § 23158(a), only physicians, nurses, phlebotomists, and specified other scientists can draw blood. Under § 23612(a)(1)(C), blood tests are administered at the direction of a peace officer pursuant to a lawful arrest where the officer has reasonable cause to believe the person was driving a motor vehicle in violation of the law. Furthermore, regulations contain standards governing collection of blood samples for forensic analysis so that integrity of the samples can be maintained. 17 C.C.R. §§ 1219, 1219.1. The procedures must be approved by the State Department of Health Services. Id. Section 1219.1 outlines specific procedures for collection and retention of blood samples.

1 In addition to this regulatory scheme, the State delegated legal authority to Barton
2 to conduct the blood draw. The hospital maintains a form which the lab technician gives to the
3 officer to complete. (Lewis Depo. at 49-50, 53.) The lab box into which the blood sample is
4 placed is provided by the Department of Justice. (Lewis Depo. at 55.) The hospital and the
5 SLTPD have a longstanding relationship in which they have agreed that the police can bring
6 someone into the hospital. The phlebotomists draws blood for the police, and then bills the police
7 who pays the hospital. (Muren Depo. at 36.) Furthermore, staff in this case assisted police by
8 directing them to a designated room where blood draws were normally taken, and assisting
9 officers with the blood draw. (Wilson Depo. at 76.) For example, when lab assistant Hudson
10 observed how combative Kraft was, she asked Mary Johnson, her supervisor, what to do. Johnson
11 responded to go ahead with the blood draw because the police officers were insisting. (Hudson
12 Depo. at 31:18-32:3.) Hudson helped restrain Kraft so that he could not hurt the other lab
13 assistant or herself. (Id. at 64:15-17.) She tried to hold his hands still so the needle could be
14 inserted, and leaned over a little bit on him with her forearms. (Id. at 64:21-65:4.)

15 The concession by Barton and evidence indicating the hospital was a state actor for
16 a blood draw is inextricably intertwined with the question whether Barton was a state actor for
17 purposes of screening and treatment. As the recitation of evidence below demonstrates, even
18 though Barton attempted to distinguish its treating role from its blood draw role with its policy not
19 to screen unless specifically asked by police officers, when push came to shove, Barton
20 recognized that it had a duty to diagnose and treat emergent conditions whenever they occurred in
21 the process of a blood draw—the duty for which it was concededly a state actor.

22 According to testimony of the emergency department director at the time, the
23 hospital does not do medical screening of people in police custody who are brought in for blood
24 draws. (Bittner Depo. at 11.) Medical screenings are only done by physicians. Nurses may make
25 a triage decision for individuals brought in for blood draws only where police have expressed to
26 the nurse that the patient needed attention or medical care. (Id. at 12-13.) Medical screenings are

1 also only performed under this condition. (Id.) “Fit for” exams are a medical clearance procedure
2 to determine if an arrestee is medically able to go to jail. (Id. at 17.) They are also provided by
3 the hospital only at the request of police. (Id.) If the arrestee requests medical attention, then the
4 police would request the fit for exam. (Id. at 17-18.) Dr. Schankerman, an emergency room
5 physician, testified that he has never provided medical care to a person brought in by the police
6 where the police did not request it; however, he testified that if someone were brought in and
7 clearly had an emergency, he would treat immediately. (Schankerman Depo. at 31-32.)
8 Furthermore, he stated that it was hospital policy not to provide medical care to a person in police
9 custody without a police request. (Id. at 31:9-11.) He explained that he has never experienced a
10 situation where police did not want him to evaluate a person because the police are “extremely
11 conservative about that.” (Id. at 32:4.) He added: “if I felt that – again, this is a little bit of
12 speculation, but if the police did not want me to examine a patient, and I wanted to, I cannot
13 believe the police would somehow deflect me or defer me from examining the patient.” (Id. at
14 32.) See also (Bittner Depo. at 11:12-22) (policy not to do screening exams on patients brought in
15 for blood draws); (Armour Depo. at 43:14-19) (same); (Wilson Depo. at 48) (policy not to do
16 triage assessment on individuals brought in for blood draws; however, for a brief time after the
17 Kraft incident, hospital changed policy to require triage on everyone who came through
18 Emergency room; policy stopped after consulting with attorney who advised such triage was not
19 necessary). This testimony is significant because it indicates that the hospital consciously
20 changed its policy for a short time, but returned to the policy in place at the time of the Kraft
21 incident which was to refrain from medical screenings on blood draw recipients. Defendant
22 correctly points out that medical staff would treat an arrestee who they determined needed medical
23 attention.

24 Finally, the facts of this very case demonstrate the inextricable intertwining of
25 blood draw duties and medical screening/treatment duties. When medical staff recognized a
26 medical emergency, they did not ask the police officers for permission to call “Code Blue,”— they

1 just did it. Although plaintiffs would argue that the recognition of a medical problem came much
2 too late, for purposes of analysis here, clearly the state actor blood draw duties included
3 recognition of, and treatment of emergent medical conditions.

4 This evidence comports with the analysis undertaken in Jensen v. Lane County,
5 222 F.3d 570, 574 (9th Cir. 2000), as cited by plaintiffs. In that case, a private psychiatrist who
6 was affiliated with a private group called Psychiatric Associates was consulted by a mental health
7 specialist employed by the county. As a result of his review of police and other reports obtained
8 from the county, the psychiatrist signed a detention order which resulted in a five day detention in
9 the county psychiatric hospital. Id. at 573. Detention was continued based on these reports and a
10 later exam by the psychiatrist. Id. The court found that the private psychiatrist was a state actor,
11 not due to detailed regulation of the psychiatrist or substantial funding, but because the
12 psychiatrist and the county had:

13 undertaken a complex and deeply intertwined process of evaluating
14 and detaining individuals who are believed to be mentally ill and a
15 danger to themselves or others. County employees initiate the
16 evaluation process, there is significant consultation with and among
17 the various mental health professionals ..., and [Psychiatric
Associates] helps to develop and maintain the mental health policies
of [the county hospital.]

17 Id. at 575.

18 The court found that the state had so insinuated itself into the process that there
19 was a close nexus between it and the defendant private psychiatrist such that his actions were
20 treated as those of the state. Id.

21 The facts of this case are not unlike those in Stypman v. City and County of San
22 Francisco, 557 F.2d 1338 (9th Cir. 1977), also cited by plaintiffs. There, a finding of state action
23 was based on the following:

24 A police officer makes the initial determination that a car will be
25 towed and summons the towing company. The towing company
26 tows the vehicle only at the direction of the officer. The officer
designates the garage to which the vehicle will be towed. The
officer notifies the owner that his vehicle has been removed, the

1 grounds for the action, and the place of storage. The towing
2 company detains the vehicle and asserts the lien for towing and
3 storage charges pursuant to a statutory scheme designed solely to
4 accomplish the state's purpose of enforcing its traffic laws. Thus
5 the private towing company is a 'willful participant in a joint
6 activity with the State or its agents.'

7 Id. at 1341.

8 The critical distinction, according to Barton, is between the act of drawing blood
9 and its function as an emergency room. Barton points to Cornish v. Correctional Services Corp.,
10 402 F.3d 545, 549 (5th Cir. 2005), where a private corporation running a correctional facility was
11 found to be a state actor only with respect to incarceration, but not with respect to employment
12 decisions such as terminating plaintiff's employment. As a matter of law, Barton argues that
13 medical screening or treatment by private medical professionals are not state actions. The court
14 would agree if Barton's action in this case were terminating an Emergency Room nurse in
15 retaliation for reporting alleged hospital misconduct in regard to blood draws to the state
16 authorities, which would be analogous to the factual scenario in Cornish.

17 Instead, Barton's conduct in regard to its state delegated duties of drawing blood
18 and providing fit-for and screening exams was much more entangled with the arrest and evidence
19 gathering process of the SLTPD such that its actions must be treated as those of the state. The
20 court recognizes that the mere fact that state government regulates blood draws or fit-for exams by
21 the hospital is insufficient per se to make the regulated entity a state actor for all purposes. See
22 George v. Pacific-CSC Work Furlough, 91 F.3d 1227 (9th Cir. 1996) (private contractor manager
23 of a correctional facility was not a state actor in employment matters). Nevertheless, the
24 additional circumstances, including delegation of legal authority to Barton, longstanding
25 agreement between Barton and SLTPD and resulting policy and procedures to perform these tests
26 and exams, actual physical participation in the police efforts to restrain Kraft for blood draw, and
performance of fit-for exam at police request, work in combination to create state action.
Furthermore, the fact that Barton had a policy to conduct a "fit for" exam at the request of police,
and would have been a state actor had it done so, does not cause it to lose its status as a state actor

1 by virtue of the fact that the police did not request such an exam in this case. On common law
2 grounds, Barton's blood draw duties included diagnostic (screening) and treatment functions, and
3 these common law duties were part and parcel of the blood draw process.

4 VII. DEFENDANT BARTON'S MOTION FOR SUMMARY JUDGMENT

5 In addition to the issue of state action, Barton's motion is made in regard to the
6 seventh, eighth and ninth claims for relief, for deliberate indifference to serious medical needs
7 under 42 U.S.C. § 1983, for violation of a duty to screen under the Emergency Medical Treatment
8 and Active Labor Act (42 U.S.C. § 1395dd), and violation of a duty to screen under California
9 Health and Safety Code § 1317, et seq., respectively. Defendants El Dorado County and
10 Atkinson, and the South Lake Tahoe defendants do not oppose the motion.

11 A. Duty Under EMTALA

12 The EMTALA provides that a hospital must provide an appropriate medical
13 screening examination or treatment to any individual who comes to its emergency department and
14 a request for examination or treatment is made by the individual or on that individual's behalf. 42
15 U.S.C. § 1395dd(a):

16 (a) Medical screening requirement

17 In the case of a hospital that has a hospital emergency department, if
18 any individual (whether or not eligible for benefits under this
19 subchapter) comes to the emergency department and a request is
20 made on the individual's behalf for examination or treatment for a
21 medical condition, the hospital must provide for an appropriate
22 medical screening examination within the capability of the
hospital's emergency department, including ancillary services
routinely available to the emergency department, to determine
whether or not an emergency medical condition (within the meaning
of subsection (e)(1) of this section) exists.

23 The requirements to establish a violation are:

24 (1) the hospital is a participating hospital, covered by EMTALA,
25 that operates an emergency department (or an equivalent treatment
26 facility); (2) the patient arrived at the facility seeking treatment; and
(3) the hospital either (a) did not afford the patient an appropriate
screening in order to determine if she had an emergency medical

1 condition, or (b) bade farewell to the patient (whether by turning her
2 away, discharging her, or improvidently transferring her) without
first stabilizing the emergency medical condition.

3 Correa v. Hospital of San Francisco, 69 F.3d 1184, 1190 (1st Cir. 1995).

4 Barton argues that plaintiffs cannot meet the second requirement because neither
5 Kraft nor the police officers requested treatment or examination. In fact, Barton staff specifically
6 asked the officers whether they were there for a legal blood draw or “fit for” exam, and officers
7 responded, “legal draw only.” As a result, Barton staff assertedly did not think Kraft was in
8 medical distress or need of medical care until he stopped breathing.

9 In regard to the interpretation of a statute by regulations, it is universally
10 acknowledged that legislative intent be first determined from the unambiguous words of the
11 statute itself. Dept. Of Housing etc. v. Rucker, 535 U.S. 125, 132, 122 S. Ct. 1230, 1234 (2002)
12 (“The Court of Appeals correctly recognized that reference to legislative history is inappropriate
13 when the text of the statute is unambiguous”).

14 The word request means: “the act of asking, or expressing a desire, for something;
15 solicitation or petition.” Webster’s New World Dictionary, Third College Edition. Plaintiffs
16 would read this word right out of the statute by, in essence, asserting: “In the case of a hospital
17 that has an emergency department, if any individual...comes to the emergency department, the
18 hospital must provide for an appropriate medical screening....” Obviously, plaintiffs seek to drop
19 the entire clause concerning a request for treatment, and this simply cannot be done by a court
20 with any respect for the words of the legislation themselves.

21 The undersigned is not saying that a request has to be verbal. Certainly, types of
22 non-verbal conduct could clearly indicate that a request was being made. However, as seen
23 above, to simply infer a request from a supposed medical condition, even in a case such as that

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1 here where the “patient” is doing everything possible to convey that he does not desire to be at the
2 medical facility, re-writes the statute into one of mere common law medical duties.⁹

3 Nevertheless, the court must address the fact that the agency in charge of
4 administering EMTALA has recently chosen to interpret the legislation in the manner in which
5 plaintiffs request. And, when an agency speaks, the courts should pay attention to the meaning
6 ascribed to interpretive regulations. Arrington v. Wong, 237 F.3d 1066, 1071 (9th Cir. 2001)
7 (Administrative agency regulations interpreting the rule ‘will often suffice to clarify a standard
8 with an otherwise uncertain scope.’”). In the case of medical screening, the Department of Health
9 and Human Resources has provided that when an individual presents at an emergency department,
10 the hospital must provide “an appropriate medical screening examination” where the individual
11 makes a request for an exam or treatment, a request is made on his or her behalf, or, in the event a
12 request is not made, “if a prudent layperson observer would believe, based on the individual’s
13 appearance or behavior, that the individual needs examination or treatment for a medical
14 condition;....” 42 C.F.R. § 489.24.

15 Even expert agencies, however, are not Congress, and cannot change the words of
16 legislation to suit their “better ideas.” Barnhart v. Sigmon Coal Co. Inc., 534 U.S. 438, 440-41,
17 122 S. Ct. 941, 945 (2002) (“The court will not alter unambiguous text in order to satisfy the
18 Commissioner’s policy preferences.”). And, it is ultimately the responsibility of the courts, not
19 the agencies, to interpret the words of statutes. “[W]e accord substantial deference to the
20 interpretation given statutes by the officers or agency charged with their administration
21 Nonetheless, the courts are the final authorities on issues of statutory construction.” Central

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23 ⁹ The court understands that in Arrington v. Wong, 237 F.3d 1066 (9th Cir. 2001) found
24 ambiguity in the phrase “comes to the emergency department.” The issue there involved whether
25 such a phrase included the transportation to the hospital in a private ambulance. The Ninth
26 Circuit determined that EMTALA should be interpreted broadly to include the transportation
scenario especially in light of the regulations issued by the Department of Health and Human
Services. However, interpreting a phrase which can reasonably be construed as ambiguous is
distinct from simply eradicating a word or phrase from the statute.

1 Montana Elec. v. Admin. of Bonneville Power, 840 F.2d 1476-1477 (9th Cir. 1988).

2 Title 42 U.S.C. § 1395hh authorizes the Secretary of H & HS to “prescribe such
3 regulations as may be necessary to carry out the administration of the insurance programs under
4 this subchapter.” Putting aside the problematic definition of “subchapter,” and whether the
5 EMTALA provisions are part of the subchapter (they are part of the same chapter), the regulation
6 changing “request” to also mean “without request” might be construed as a “legislative” rule
7 which has the force and effect of law, see Erringer v. Thompson, 371 F.3d 625, 630 (9th Cir.
8 2004) in which case the standard of review would be “arbitrary and capricious.” Arrington, 237
9 F.3d at 1070. However, the rule cannot be “legislative” because the agency has no authority to
10 issue a retroactive legislative rule unless the authorizing statute *expressly* authorizes retroactivity.
11 Newman v. Apfel, 223 F.3d 937, 942 (9th Cir. 2000). No such authorization exists in § 1395hh,
12 and thus, construing the rule as a legislative rule, one could not apply it to the events in question
13 which predated the rule—which is the case here.

14 At best, even considering the rule to be interpretive (something seemingly at odds
15 with the authorizing language), and thus not subject to a retroactivity proscription, Barona Grp. v.
16 American Manag. & Amusement Co., 824 F.2d 710, 722 (9th Cir. 1987), interpretive rules do not
17 have the force of law, Erringer v. Thompson, supra, and simply define the statute as it always was.
18 The “permissive” standard of review would apply, Arrington, supra. For the reasons expressed
19 above, the undersigned cannot find the addition of a “without request” provision as permissibly
20 interpreting a statute which expressly required a “request” to be applicable.¹⁰

21 In this case, the language of the statute, insofar as it requires a request, is clear and
22 certain in scope and requires no explanation of this term. It requires that an individual presents at
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24 ¹⁰ This is not to say that a request could not be made with conduct as opposed to words,
25 or that any precise words have to be used. Certainly an ambulance attendant’s statement: “this
26 man is hurt, get help” is a request for treatment. We have no party which asserts that plaintiff
made any request, verbal or non-verbal for treatment, nor did anyone make a request on his
behalf.

1 the emergency department *and* a request for examination or treatment is made. Arrington, 237
 2 F.3d at 1070 (emphasis added). The regulation attempts to rewrite the statute and change its legal
 3 significance by eliminating the word “request” and negating this requirement.¹¹ In no way does
 4 the regulation seek to clarify the construction of the term, but seeks to expand on the statute by
 5 negating the request requirement altogether.

6 The Court has tried but it cannot conceive of a realistic situation where a person,
 7 who cannot communicate in some verbal or non-verbal fashion for himself, would nevertheless be
 8 able to show up at an emergency room, unattended by someone, in order to be screened or
 9 treated.¹² Clearly, such an impaired person would be brought to the hospital by someone, relative,
 10 friend, stranger-on-the-street, ambulance attendant, etc. But the rule suggests that under
 11 EMTALA the hospital should treat persons like Kraft, who are attended, as if they have no right to
 12 refuse screening and/or treatment. Strap them down, screen them, take a blood draw or other
 13 invasive procedure if necessary for the screening process, and stabilize them. This sounds much
 14 like what plaintiffs complain about in the first place. Perhaps Congress thought about this
 15 unlikely scenario and rejected a rule where *no* person consented, or even asked, in some fashion to
 16 the screening or other medical procedure. Perhaps Congress did not think about it at all.

17 Whatever the correct scenario, agencies have no power to rewrite a statute which uses a specific,

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21 ¹¹ In fact, there is evidence that Kraft himself did everything he could, by his words and
 22 actions, to *not* request medical care. He did not want to present himself at this hospital, and did
 23 everything he could to leave. Plaintiffs’ cited case, Evans v. Montgomery Medical Center, 1996
 24 WL 221526 (E.D. Pa. 1996), although at first glance piques interest, is distinguishable in
 addition to being non-binding and unpublished. There, the decedent arrestee was also taken in
 for a blood alcohol test by police; however, he signed a consent to hospital care form. Here,
 Kraft signed no such form.

25 ¹² Even a mentally impaired person is not going to show up unattended at a hospital
 26 emergency room and not be able to make some intimation that he or she would like treatment of
 some sort.

1 required term, or negate the use of a term used, under the guise of “interpretation.”¹³

2 Finally, although resort to legislative history is inappropriate and unnecessary, even
 3 it does not favor plaintiffs’ position. EMTALA, commonly known as the Patient Anti-Dumping
 4 Act, was enacted by Congress to respond to the specific problem of hospital emergency rooms
 5 refusing to treat uninsured patients or those who could otherwise not pay for treatment. Baker v.
 6 Adventist Health, Inc., 260 F.3d 987, 993 (9th Cir. 2001). Before its enactment, emergency rooms
 7 would either decline to provide treatment or transfer medically unstable patients to other hospitals,
 8 thereby jeopardizing the patient’s health. According to the legislative history of the Act, Congress
 9 intended to prevent hospitals from refusing to treat or from dumping patients who lack insurance
 10 coverage. See H.R.Rep. No. 241, 99th Cong., 2d Sess., 27, reprinted in 1986 U.S.C.C.A.N. 42,
 11 605; Note, *Preventing Patient Dumping*, 61 N.Y.U.L.Rev. 1186, 1187-88 (1986). It is well
 12 established that EMTALA is not a remedy for claims of medical negligence, failure to treat, or
 13 deliberate indifference. See Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1258 (9th Cir.1995)
 14 (Congress did not enact EMTALA to improve overall standard of medical care). Claims of failure
 15 to treat or improper treatment, such as those asserted by plaintiffs here, remain the exclusive
 16 province of either negligence under state law or deliberate indifference under federal law.

17 Here, there was no issue whatsoever concerning whether Kraft was unable to pay
 18 for services and that the hospital did not want to treat him as a result. There was also undisputed
 19 evidence that Barton would, if requested, screen or treat Kraft. In fact, hospital staff asked police
 20 whether they should perform a “fit for” exam. (Dunn Depo. at 14:4-15:11.) Requiring a hospital
 21 to do more than this without a request would lead to a result not intended. The court finds that

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 23 ¹³As will be seen however, this does not mean that medical personnel at a hospital should
 24 not inquire, or even press their inquiry about treatment, under common law or constitutional
 25 directives. However, if there is such liability, it cannot be found under EMTALA in that nothing
 26 in the statute requires hospital personnel to inquire, repeatedly inquire, plead, beg, remonstrate or
 the like in order to persuade a person to be screened or treated, or to persuade that person’s
 attendant. The statute, and that is what is being interpreted here, places the burden of a request
 on non-hospital personnel.

1 EMTALA is not applicable to this case, insofar as no request for treatment was made by anyone.

2 B. Duty Under Cal. Health and Safety Code § 1317, et seq.

3 California Health and Safety Code § 1317 provides in part:

4 (a) Emergency services and care shall be provided to any person
5 *requesting* the services or care, or for whom services or care is
6 *requested*, for any condition in which the person is in danger of loss
7 of life, or serious injury or illness, at any health facility licensed
8 under this chapter that maintains and operates an emergency
department to provide emergency services to the public when the
health facility has appropriate facilities and qualified personnel
available to provide the services or care.

9 Cal. Health & Safety Code § 1317 (emphasis added).

10 This state code section is analogous to EMTALA. Baker v. Adventist Health, 260
11 F.3d 987, 995 (9th Cir. 2001). For the reasons stated above, Barton's motion for summary
12 judgment is granted on this claim.

13 C. 42 U.S.C. § 1983

14 Having found that Barton was a state actor in regard to plaintiffs' motion for partial
15 summary judgment, the issue is whether the hospital was deliberately indifferent to Kraft's
16 medical needs as a matter of law. The standards regarding this issue have been set forth in
17 conjunction with a similar claim against defendants El Dorado and Atkinson in Section V.C.
18 *supra*.

19 Plaintiffs argument is twofold. First, they claim that Barton's policy to not screen
20 or treat individuals in custody unless requested by police amounts to deliberate indifference
21 because such a restraint on the arrestee's ability to act on his own behalf violates substantive due
22 process. Second, they claim that the actions of Barton's staff were deliberately indifferent, in any
23 event.

24 1. Barton's Policy

25 The seventh claim for relief in the first amended complaint alleges that Barton had
26 a policy not to screen arrestees brought in by police unless requested by police, that police did not

request a screening in this instance, and that in accordance with Barton's policy, a screening was not performed on Kraft until after he went into cardiac arrest. Am. Compl. at ¶¶ 70-72.

A defendant cannot be held liable under section 1983 on a respondeat superior or vicarious liability basis. Monell v. Department of Social Serv., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Monell involved a municipal corporation, but every circuit court to consider the issue has extended the holding to private corporations as well.

Harvey v. Harvey, 949 F.2d 1127, 1129 (11th Cir. 1992) (citations omitted). See also Buckner v. Toro, 116 F.3d 450, 452 (11th Cir. 1997) (affirming that Monell applies to private entity which acts as equivalent of municipality); Rojas v. Alexander's Dep't Store, Inc., 924 F.2d 406, 408-09 (2d Cir. 1990) (department store not liable for manager's detention of customers without probable cause unless it had a policy to arrest on less than probable cause); Robinson v. City of San Bernardino Police Department, 992 F. Supp. 1198, 1204 (C.D. Cal. 1998) (citing cases outside Ninth Circuit). In Harvey, the court held that the hospital could not be held liable for the acts of the hospital's employees. Id. at 1130. Municipal corporations, or those private persons or entities acting on behalf of the state, are viewed as "persons" under section 1983. Hampton International Communications, Inc. v. Las Vegas Convention and Visitors Authority, 913 F. Supp. 1402, 1407 (D. Nev. 1996); Moore v. Wyoming Medical Center, 825 F. Supp. 1531, 1543, n. 8 (D. Wyo. 1993) (mentioning that arguably a private corporation acting as a municipality is not an individual but is in effect the municipality).

The general rules applicable to counties and municipalities provide that since there is no respondeat superior liability under § 1983, these entities may be sued under § 1983 only upon a showing that an official policy or custom caused the constitutional tort. See Mt Healthy City School Dist Board of Education v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568 (1977); Monell v. New York City Dep't of Social Services, 436 U.S. 658, 691, 98 S. Ct. 2018 (1978). "A local government entity cannot be held liable under § 1983 unless the plaintiff alleges that the action inflicting injury flowed from either an explicitly adopted or a tacitly authorized [governmental]

1 policy.” Ortez v. Washington Cty., State of Or., 88 F.3d 804, 811 (9th Cir.1996) (citation and
 2 quotations omitted) (alteration in original) “[L]ocal governments, like any other § 1983 ‘person,’
 3 ... may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even
 4 though such a custom has not received formal approval through the body’s official
 5 decisionmaking channels.” Monell, 436 U.S. at 690-91.

6 A § 1983 claim against a municipality or entity requires that a plaintiff establish (1)
 7 deprivation of a constitutional right; (2) a policy by the county or entity; (3) the policy
 8 constituted deliberate indifference to plaintiff’s constitutional right; and (4) the policy was the
 9 “moving force behind the constitutional violation.” Mabe v. San Bernardino County, Department
 10 of Public Social Services, 237 F.3d 1101, 11110-11 (9th Cir. 2001) (quoting Van Ort v. Estate of
 11 Stanewich, 92 F.3d 831, 835 (9th Cir.1996)).

12 Assuming for purposes of element number one that Barton had such a policy to not
 13 screen arrestees unless requested by law enforcement, such a policy could constitute deliberate
 14 indifference. Plaintiffs have submitted evidence that Barton had such a policy. Dr. Schankerman
 15 testified that it was hospital policy not to provide medical care to a person in police custody
 16 without a police request. (Schankerman Depo. at 31:9-11.) See also (Bittner Depo. at 11:12-22)
 17 (policy not to do screening exams on patients brought in for blood draws); (Armour Depo. at
 18 43:14-19) (same);(Wilson Depo. at 48) (policy not to do triage assessment on individuals brought
 19 in for blood draws; however, for a brief time after the Kraft incident, hospital changed policy to
 20 require triage on everyone who came through Emergency room; policy stopped after consulting
 21 with attorney who advised such triage was not necessary). Defendant objects to plaintiffs’ dispute
 22 over its undisputed fact contention that it treats individuals in the emergency room perceived to be
 23 in need of medical attention, despite any failure to request screening or treatment. (Bittner Decl.
 24 at 2:24 - 3:3.); (Schankerman Depo. at 31-32.) If this contention is part of its policy, then
 25 Barton’s policy does not necessarily amount to deliberate indifference, but raises a question of
 26 fact as to the terms of the policy.

1 The depositions of nurses Armour and Burkart are examples of the questions of
2 fact surrounding the hospital's policy. Armour's testimony was that she was not aware of a
3 specific policy addressing the situation where an arrestee is brought in by police for a fit-for exam
4 or blood draw but appears to be ill. (Armour Depo. at 45, 63-64.) Plaintiffs cite to Nurse
5 Burkart's deposition testimony for the proposition that the hospital does not make the screening
6 decision, but that police does. Defendant argues that the same deposition testimony merely
7 describes how police use the hospital facility for legal blood draws. Burkart testified:

8 A. After he was brought into the emergency room, I did not have
9 contact with him. He was taken to Room 5, which is our standard
10 room for legal BAs, and I was taking care of other patients. He did
11 not need nursing care.

12 Q. And what makes you say he did not need nursing care?

13 A. He was there for a legal BA, which is standard procedure, and
14 that does not include any nursing intervention.

15 (Burkart Depo. at 17:14-23.)

16 Elsewhere, Burkart testified that her understanding regarding legal blood draws is
17 that they do not include any nursing intervention because the police are just using the facility. (Id.
18 at 53:5-10.) She stated that she has never done a medical assessment for a legal blood draw when
19 she was not asked to do so by a police officer. The practice of emergency room staff was to wait
20 and see whether the officer asked her to do an assessment. (Id. at 53:16-25.)

21 Armour's deposition, on the other hand, indicates that she did not know of any
22 specific policy in regard to a situation where an arrestee is brought in by police and appears to be
23 ill, and that she has not been present when such a situation occurred. (Armour Depo. at 45:2-6;
24 45:7-9.) Armour also testified, however, that she did know of a policy where police bring in
25 individuals who need medical attention for legal blood draws:

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1 Q. Do you know if the hospital has any policies that are either
2 formal or informal about police officers bringing people in for legal
3 blood draws?

4 A. The policy I am aware of is that unless they need medical
5 clearance, we don't register them and do a screening exam.

6 Q. What's medical clearance?

7 A. I could probably best just give you an example. If an individual
8 says they have a medical problem, typically the officers will have a
9 screening exam to make sure that they are fit to go to jail.

10 Q. Is this what's known as a "fit for"?

11 A. Yes.

12 Q. But unless you, someone in the hospital has been told that they
13 need a "fit for examination," the patient does not get any medical
14 examination at all?

15 A. Correct.

16 ...

17 Q. Is there ... Does the Barton ER have a policy for what to do if
18 someone brought in by police officers appears to be ill?

19 A. I don't know of any specific policy regarding that.

20 (Armour Depo. at 43-45.)

21 Although nurse Bittner's testimony also speaks to staff policy not to make a triage
22 decision or perform screenings unless police requests are made, defendants point out that this
23 policy does not apply to the situation where staff perceive a medical necessity. Dr.
24 Schankerman's testimony supports defendant's version of the facts:

25 Q. I'm asking about the policy, where the policy's --

26 A. I guess I don't have a clear understanding of the question. If

1 someone's brought in and clearly has an emergency, I would
2 certainly treat them immediately. I've certainly never been in the
3 situation where the police do not want me to evaluate a patient.
4 They're extremely conservative about that.

5 (Schankerman Depo. at 31-32.)

6 Elsewhere in his deposition, however, Schankerman testified that he would not
7 provide medical treatment on someone brought in by police for a legal blood draw:

8 Q. Have you ever had to provide medical treatment for somebody
9 who was brought in for a legal blood draw by the police?

10 A. There's no possibility of that because unless they are – unless
11 the police request a medical evaluation, I would have no
12 involvement with the patient or subject.

13 (Id. at 29-20.)

14 Based on the aforementioned testimony as well as the testimony of other Barton
15 staff, it is unclear what, if any, policy existed in regard to screening or treating individuals brought
16 in by police who were in need of medical care despite being brought in for blood draws, and
17 therefore a dispute of fact exists as to the nature of the policy and whether it amounted to
18 deliberate indifference to plaintiffs' constitutional rights, as well as whether it was the "moving
19 force behind the constitutional violation." Barton's motion for summary judgment is denied in
20 regard to whether it had a policy which constituted deliberate indifference.

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2. Whether Actions of Barton Constituted Deliberate Indifference as a Matter of Law¹⁴

The record is disputed as to whether the actions of hospital staff were deliberately indifferent to Kraft's needs. There are lay witnesses who did not think Kraft needed medical assistance at the scene of the car accident and on arrival at the hospital. (Moulton Depo. at 17:12-16, 28:20-25.) (Kraft's eyes were shifty and appeared to be hallucinating but no other abnormalities were apparent from his physical appearance.) Police officer witnesses testified that Kraft was combative, and that they had to struggle to put him on a gurney. (Wilson Depo. at 20.)¹⁵ At the entrance to the emergency room, the parties dispute whether Kraft was combative or merely uncooperative. Barton states that at no time did emergency room staff infer from Kraft's actions that he was in need of medical care. Officer Gentle testified that while Kraft was in the back seat of the police vehicle, he was yelling and kicking the passenger door so hard that the car was shaking a couple of inches. (Gentle Depo. at 85-86.) Emergency room technician Weaver testified that while Kraft was on the gurney between the emergency room and room 5, Kraft did not appear to be in respiratory distress or cardiac distress, or at risk of same. His color looked good. (Weaver Depo. at 71-72.) Nurse Wilson testified, on the other hand, that in her 19 years at Barton Hospital, she had never seen someone come in for a blood draw who was as out of control, combative or wild as he was. (Wilson Depo. at 88-89.)

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¹⁴ Barton does not claim that as an entity it could not be liable for the acts of its employees, as opposed to a policy which is put into effect. Barton does not claim that § 1983 private entities should be treated as federal private entities in Bivens claims, see Corr. Services Corp. V. Maleski, 534 U.S. 61, 122 S. Ct. 515 (2001), and probably correctly so.

¹⁵ It is interesting to note that plaintiffs dispute this fact, claiming he was merely uncooperative. Their own experts, however, relied on Kraft's agitated demeanor in forming their opinions. Dr. Herrmann notes that Kraft was yelling profanities and screaming as he was being wheeled into the emergency room, that he was extremely agitated and yelling and moving about, and that it took four officers to hold him down on the gurney. Herrmann Decl. and attachment at 2.

1 Barton objects to the declarations of plaintiffs' experts, Drs. Paul Herrmann and
2 Benjamin Lerman, because the declarations state only that the attached Rule 26(a) opinions are
3 true and correct copies, but that the declarations should contain their opinion testimony under
4 penalty of perjury. The declarations as submitted are sufficient for purposes of summary
5 judgment.

6 Barton also objects that the reports contain hearsay information and irrelevant
7 conclusions. After reviewing the declarations and attached reports, the court determines that
8 Barton's objections are overruled. These opinions raise disputes of fact over the care given by the
9 hospital and whether it was deliberately indifferent. Dr. Herrmann's opinion states that he
10 disagrees with the coroner's statement of cause of death as limited to excited delirium associated
11 with cocaine intoxication. (Hermann Decl. and attachment, at 3.) He states that the bad effects of
12 the cocaine intoxication were aggravated by the handling of Kraft which caused him to struggle
13 more and resulted in increased oxygen demand. (Id. at 4.) Impeding his breathing caused oxygen
14 deprivation which can result in cardiac arrest. Herrmann states that hospital staff are expected to
15 be aware of the critical nature of drug intoxication. (Id. at 5.)

16 Lerman's report states that his drug induced state on arrival at the emergency room
17 should have prompted police and medical personnel who witnessed it to request a screening exam.
18 (Lerman Decl. and attachment at 2.) Kraft should have been sedated. (Id.) He states that the
19 police restraints including the pillowcase on his head, interfered with his oxygen intake and
20 prevented personnel from observing his discoloration due to lack of oxygen. (Id. at 3.) If Kraft
21 had been treated on arrival, he more than likely would have survived. (Id.) If he had been left
22 unmolested at a minimum without any medical care, there was an excellent chance, according to
23 Lerman, that he would have metabolized his cocaine without suffering cardiac arrest. (Id.)

24 Based on these disputes of fact, Barton's motion for summary judgment in regard
25 to claims of deliberate indifference, both as to Barton's policies and actions, is denied.

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1 CONCLUSION

2 For the reasons stated within this opinion, IT IS ORDERED that:

3 1. Defendants El Dorado County and Atkinson's motion for summary judgment,
4 filed June 23, 2005, is granted;

5 2. Plaintiffs' motion for partial summary judgment, filed June 20, 2005, is granted;

6 3. Defendant Barton's motion for summary judgment, filed June 23, 2005, is
7 granted in part and denied in part.

8 4. Plaintiffs' motion to exclude at trial testimony of expert Don Cameron, filed
9 June 20, 2005, is vacated from the calendar.

10 DATED: 8/24/05

/s/ Gregory G. Hollows

11 _____
12 GREGORY G. HOLLOWS
13 U. S. MAGISTRATE JUDGE

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